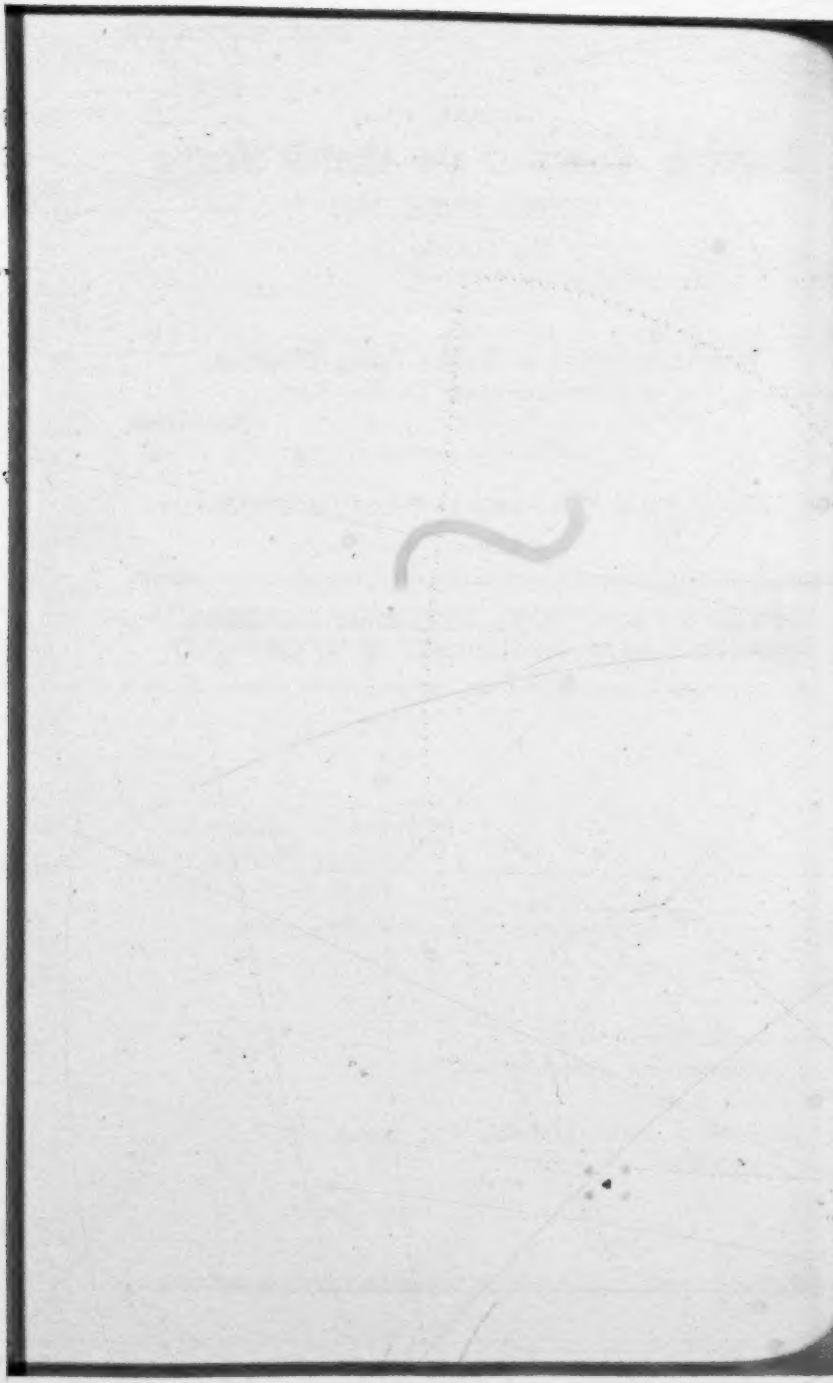

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1336

In re Application of FRE LE POOLE GRIFFITHS,
For Administration To The Bar,
Appellant.

ON APPEAL FROM THE SUPREME COURT OF CONNECTICUT

BRIEF OF NEW YORK ATTORNEY GENERAL, AMICUS CURIAE, IN SUPPORT OF AFFIRMANCE

The New York Attorney General submits this brief in support of affirmance of the judgment of the Connecticut Supreme Court. We note that the appellant's counsel have, in a letter dated September 21, 1972, consented to its filing on or before October 6, 1972.

New York's Interest in this Appeal

New York is interested in the disposition of this appeal by reason of the fact that New York, like Connecticut, has a requirement that an applicant for admission to its State Bar, be a "citizen" (New York Judiciary Law §§ 460; 467; CPLR § 9406; and N.Y. Court of Appeals Rule §§ 521.1 and 527.1), a requirement that is currently being challenged in a suit now pending before a three-judge Court in the Southern District of New York (*Van Ginkel et al.* v. *Stevens*, 72 Civ. 1331).

The New York statutory provisions are set forth in an appendix at the end of this brief.

Principle Constitutional Provisions Involved

ARTICLE IV, § 3 of the Constitution of the United States provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Section 1 of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

New York Position

We support the position of the Supreme Court of the State of Connecticut that it is *constitutional* to require persons who desire to be licensed to practice law in a State to be citizens of the State and of the United States.

We note that the chief basis upon which the plaintiff attacks the Connecticut requirement is that it violates the Equal Protection Clause (App. Br., pp. 2, 6-7, 9-26). We recognize that certain classifications based upon alienage are "subject to close judicial scrutiny". *Graham* v. *Richardson*, 403 U.S. 365 (1971).* But we submit that

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* As the appellee (Brief, pp. 6-12) so forcefully demonstrates, this need for close judicial scrutiny arises only when legislation is directed *against* aliens to deprive them invidiously of generally-accepted rights (e.g. employment in the common occupations and welfare benefits in lieu thereof) on the basis of race or a special national status. Otherwise the test should be one of reasonableness. *Graham* (*supra*), at p. 371.

even in the face of such "scrutiny", there remain certain "privileges and immunities" which are inherent in citizenship and which the States are entitled to restrict to their citizens. If not, under the mantle of "equal protection", the distinction set forth in the Fourteenth Amendment itself between "citizens" and other "persons" tends to become completely obliterated. And if we were to grant to the non-citizen virtually all the constitutional privileges of the citizens, even the inducement to naturalization would be diminished.

A government must have a broad discretion to establish a preference for its own citizens who will, as lawyers, be entrusted with significant functions in the operation of one of the three principle branches of its government (the judiciary), as well as important services in its executive branch (e.g., numerous offices as prosecuting attorneys, in the enforcement of law), in addition to myriad confidential and fiduciary functions that attorneys may be required to perform on behalf of individual clients. Restated, our position is that, under the specific terms of the Fourteenth Amendment, while each State is required to grant equal protection to all "persons" subject to its jurisdiction, it *may* reserve to its own citizens the right to practice *its* law in *its* Courts and to serve in other capacities as an attorney within *its* jurisdiction.

To paraphrase the opinion of Chief Justice BURGER in *Perry* v. *Sinderman*, —— U.S. ——, 33 L.Ed. 2d 570, 581 and *Board of Regents* v. *Roth*, —— U.S. at pp. , 33 L.Ed. 2d 548, 561 (June 29, 1972), the relationship between a state government (or one of its three main branches, the judiciary) and its attorneys is "essentially a matter of state concern and state law". In *this* matter of *state* concern, the right to practice law, a State should be entitled to restrict its constitutional privileges to "citizens". This privilege of citizenship is a concomitant of the similar broad discretion which a public employer has to

establish qualifications for its employees related to the efficiency and integrity of the operations of government. See *United Public Workers* v. *Mitchell*, 330 U.S. 75, 101 (1947); and *Keim* v. *United States*, 177 U.S. 290, 293 (1900). See also the New York Attorney General's brief in *Sugarman* v. *Dougall* (71-1222; October, 1971 Term).

In *Dunn* v. *Blumstein*, 405 U.S. 330 (1972), Mr. Justice MARSHALL recognized that to "decide whether a law violates the Equal Protection Clause" the Court looked, in essence to three things (p. 335):

> "the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification".

In *Dunn*, the Court was considering the validity of restrictions upon the constitutional right of *"citizens"* to vote (405 U.S., at p. 336). In *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) the restrictions involved were placed upon the fundamental right of "persons" to interstate travel. Clearly, *citizens* have certain rights, like the right to vote, which other *persons* do not possess. It is settled, therefore, that this Court must consider the status of the person asserting a right in order to determine the protection to which he or she is entitled.

In *Sugarman* v. *Dougall* (*supra*, Oct. Term, 1971 No. 71-1922), we have argued (Attorney General's Brief, p. 19), in a case testing the validity of a citizenship qualification for public employment, that the "compelling state interest" test is applicable only to legislation which affects a specific constitutional or fundamental right.* Neces-

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* This test was utilized by Chief Justice WARREN in *Kramer* v. *School District*, 395 U.S. 621 (1969) despite the fact that the voting restrictions there challenged had been litigated solely upon a basis of their reasonableness. Although the case was remanded to

(*footnote continued on following page*)

sarily, therefore, we seek to focus our attention on the nature of the right which is being asserted by the person who challenges our statutory classification. And we urge that no State be burdened with the task (particularly upon the basis of ancient legislative records which may not reflect completely the purpose of long-established, long-undisturbed and only recently-challenged laws) of showing a "compelling state interest" for legislation which does not even restrict a *constitutional* right.

The appellee (Br. pp. 15-18) has succinctly demonstrated that the federal government as well as the States has restricted the activities of aliens and barred them from positions which would present a possible conflict of loyalties. And it has also demonstrated (Br. pp. 12-14) that the States have been permitted to regulate the practice of the law in order to protect the integrity of the judicial process. *Law Students Civil Rights Research Council* v. *Wadmond*, 401 U.S. 154, 167 (1971), aff'g 299 F. Supp. 117, 125 (S.D. N.Y. 1969). Indeed, in the *Law Students* case, where an omnibus attack was launched against admission procedures and requirements, Mr. Justice STEWART took the pains to observe (p. 161):

"The appellants do not take issue with the citizenship

(*footnote continued from preceding page*)

the District Court for further proceedings in accordance with Judge WARREN'S opinion, New York made no attempt on remand to litigate the question of the "compelling necessity" for its voting restriction since, as the Attorney General had pointed out to this Court, New York was already in the process of eliminating property qualifications from its various voting rights statutes (No. 258, Oct. Term, 1968, Attorney General's Brief, pp. 6, 14-15). In effect, therefore, in *Kramer*, this Court decided the case before it on a "compelling necessity" basis which had not been litigated and has *remained unlitigated*. Before this Court the appellant had, at most, urged "close judicial scrutiny" (App. Br., p. 7). Even the dissenting Judge in the District Court had, while employing more "stringent limitations on state power" (282 F. Supp. 70, 80), rejected the property qualification for voting as "arbitrary". (No. 258, Oct. Term, 1968; Appendix, p. 56; 282 F. Supp. 70, 79-84)

and minimum-residence requirements, nor with the items on the questionnaires for applicants dealing with these requirements".

We deem it both significant and persuasive that in the all-out attack made in *Law Students,* those plaintiffs did not see fit to attack New York's citizenship requirement. It implies a recognition, at least by those litigants, that membership in a state Bar was a "privilege and immunity" (a constitutional right) to which only citizens were entitled and not a "privilege" which "persons" who were non-citizens might seek.

Aliens have no *substantive right* to be members of a State bar. *United Public Workers* v. *Mitchell,* 330 U.S. 75, 101 (1947); *Theard* v. *United States,* 354 U.S. 278 (1957). Each State should be permitted to determine whether certain potential *conflicts of interest* prevent licensed professionals from properly performing their duties as functionaries of *its* Courts. *Theard* v. *United States* (*supra,* at p. 281).

The mere willingness to subscribe to a constitutional oath of office may reasonably be deemed inadequate to dispel doubts as to a potential conflict of interest of a Bar applicant who declines, in addition, to indicate a willingness to surrender her foreign citizenship or to embrace our own citizenship. See *Connell* v. *Higginbottom,* 403 U.S. 207, 208, 210 (1971); and *Knight* v. *Board of Regents,* 269 F. Supp. 339 (1967), aff'd *per curiam,* 390 U.S. 36 (1968) sustaining the requirement that public employees take a constitutional oath of office. Although an inquiry into philosophical or political beliefs may be proscribed (*Connell,* at p. 210), the States are not precluded from adopting legislation which prevents conflicts of interest. Indeed, this Court has found it necessary to adopt such standards to prevent conflicts of interest between federal judicial functions and the other activities of federal judges.

New York, too, has deemed it essential, to prevent conflicts of interest among state officers, employees and even political party officers, to enact specific *prohibitions* against certain business or professional activities. New York Public Officers Law, §§ 73, 73-a (L. 1954, chs. 695 and 696, as amended).

Conclusion

Since the appellee has dealt so adequately with the appellant's allegations of error, we shall not extend this brief further. We deem it sufficient to have stressed herein the lack of any *substantive* right on the part of any alien to practice law in any State court; the valid interest which any State has in the conduct of its judicial functions by citizens whose loyalty is undivided and who may not be subject to any questionable conflict of interests. Equal Protection, we submit, does not require extending to non-citizens all the "privileges and immunities" which are guaranteed to "citizens" alone by the very terms of the Fourteenth Amendment.

The judgment appealed from should be affirmed.

Dated: New York, New York, September 26, 1972.

Respectfully submitted,

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State of New York
Amicus Curiae

Samuel A. Hirshowitz
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Assistant Attorney General
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APPENDIX

N. Y. Judiciary Law, § 460 provides:

"§ 460. EXAMINATION AND ADMISSION OF ATTORNEYS

A citizen of the state, of full age, applying to be admitted to practice as an attorney or counsellor in the courts of record of this state, must be examined and licensed to practice as prescribed in this chapter. Race, creed, color, national origin or sex shall constitute no cause for refusing any person examination or admission to practice."

N. Y. Judiciary Law, § 467, provides, in part:

"§ 467. REGISTRATION OF ATTORNEYS BEFORE BEGINNING TO PRACTICE

Every person who is hereafter duly licensed and admitted to practice as an attorney and counsellor-at-law in the courts of record of this state by an appellate division of the supreme court, shall subscribe and take and file an oath or affirmation which must be substantially in the following form, the blanks being properly filled before he begins or is entitled to begin to practice for another as an attorney and counsellor-at-law in the courts of this state:

State of New York, }
..... County. } ss.:

I, ..., being duly sworn (or affirmed) do depose and say that I am a natural born citizen of the United States (if naturalized, state when and where) and * * *"

N. Y. CPLR 9406 provides, in part:

"R. 9406. Proof. No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect:

1. that he believes in the form of the government of the United States and is loyal to such government;

2. that he is a citizen of the United States;"

N. Y. Court of Appeals Rule § 521.1 provides, in part:

"§ 521.1 Proof required by State Board of Law Examiners. An applicant for admission to the bar examination shall furnish to the State Board of Law Examiners proof satisfactory to said board:

(a) as to his age, date of birth, and that he is over twenty-one years of age; and

(b) as to place of birth; and

(c) that he is a citizen of the United States; and"

N. Y. Court of Appeals Rule § 527.1 provides, in part:

"§ Section 527.1 General regulation. In its discretion the Appellate Division may admit to the bar and license to practice without examination a person who,

(a) has been admitted to practice in the highest law court in any other State or territory of the United States or in the District of Columbia, or has been admitted to practice as an attorney and counselor at law or the equivalent in the highest court in another country whose jurisprudence is based upon the principles of the English common law; and

(b)(1) while residing in such other country, State, territory or in the District of Columbia, or the commonly

used residential areas contiguous therewith, has actually practiced for a period of at least five years in its highest law court or highest court of original jurisdiction; or

(2) is a graduate of and has received a first degree in law from an approved law school as defined in section 523.2 and, for a period of at least five years immediately preceding his application, has been employed in this State or in any other State or territory of the United States or in the District of Columbia as a full-time member of the law faculty teaching in a law school or schools on the approved list of the American Bar Association and has attained the rank of professor, associate professor or assistant professor; and

(c) is a citizen of the United States; and"